In the

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
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No. 79-952

EDDIE C. THOMAS,

Petitioner,

vs.

REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION, WILLIAM H. SKINNER, J. FRANK HALEY, and RALPH MILES, as members and as constituting the Review Board of the Indiana Employment Security Division.

and

BLAW-KNOX FOUNDRY & MACHINERY, INC.,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF INDIANA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

On February 24, 1976, the Referee of the Indiana Employment Security Division entered his decision in the instant case, Petitioner's Appendix pp. 1a-3a, contained in the Petition for Certiorari, and hereinafter referred to as "Pet. App." The Review Board of the Indiana Employment Security Division affirmed the Referee's decision on November 29, 1976, Pet. App. pp. 4a-5a. Petitioner appealed

and on October 26, 1978, the Court of Appeals of Indiana rendered a decision favorable to the appellant, which decision is reported in *Thomas* v. *Review Board of Indiana Employment Security Division* ..... Ind. App. .....; 381 N.E. 2d 888 (1978); Pet. App. pp. 6a-24a. Rehearing was denied in an unpublished order of November 22, 1978, Pet. App. p. 25a. The opinion of the Supreme Court of Indiana, entered on July 18, 1979, is reported at ..... Ind. ....., 391 N.E.2d 1127 (1979), Pet. App. pp. 26a-48a. A petition for rehearing was subsequently denied in an unpublished order of September 20, 1979, Pet. App. p. 49a.

JURISDICTION

The judgment to be reviewed is the July 18, 1979, opinion and order of the Supreme Court of Indiana, Pet. App. pp. 26a-48a, which reversed the decision rendered by the Court of Appeals of Indiana in the instant case. A petition for rehearing in the Indiana Supreme Court was denied on September 20, 1979, Pet. App. p. 49a. The Petition for a Writ of Certiorari was filed on December 18, 1979, and was granted by this Court on February 19, 1980. Jurisdiction is conferred on this Court by 28 U.S.C.A. § 1257 (3).

QUESTION PRESENTED

Whether the application of the disqualifying provisions of the Indiana Employment Security Act, Indiana Code 22-4-15-1, (Burns Code Ed., 1974) to the petitioner, a Jehovah's Witness, constitutes a denial of his First Amendment right to the free exercise of religion when he voluntarily terminated his employment in an armament factory because his religious beliefs prevented him from participating in the production of armaments or in any war related activities.

STATUTES AND AMENDMENTS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV.

With respect to benefit periods including extended benefit periods established subsequent to July 6, 1974, and before July 3, 1977, an individual who has voluntarily left his employment without good cause in connection with the work or who was discharged from his employment for just cause shall be ineligible for waiting period or benefits rights for the week in which the disqualifying separation occurred and until he has subsequently earned remuneration in employment equal to or exceeding the weekly benefit amount of his claim in each of ten (10) weeks. The weeks of a disqualification period remaining at the expiration of an individual's benefit period will be

carried forward to an extended benefit period or to the benefit of a subsequent claim only if the first week of such extended benefit period or subsequent period falls within ten (10) consecutive weeks from the beginning of the disqualification period imposed on the prior claim. Indiana Employment Security Act, Chapter, Section 1; Indiana Code 22-4-15-1, (Burns Code Ed; 1979 Supp.)

STATEMENT OF THE CASE

The petitioner, Eddie C. Thomas, was hired as a chainman "hooker" in the roll foundry by respondent, Blaw-Knox Foundry and Machinery Company, Inc., (hereinafter referred to as Blaw-Knox). On his initial application form, petitioner indicated a religious belief of Jehovah's Witness, and his hobbies as Bible study and Bible reading. Petitioner worked in the roll foundry for approximately a year and performed his job satisfactorily. When this division of Blaw-Knox was permanently closed in November, 1975, he was transferred to another department where he began working in the production of turrets for tanks, a department also known as the turret line. Upon commencing his job in that department, petitioner realized that his new job directly involved the manufacture of armaments, an activity strictly prohibited by his religion. Petitioner searched for a transfer to another department at Blaw-Knox that would not be armament related, but found that all of the remaining departments of the company were engaged in the production of items used in the advancement of war. After management's denial of his request for a lay-off, petitioner voluntarily terminated his employment with Blaw-

Knox on November 6, 1975, due to his religious beliefs. See generally, Pet. App. pp. 2a-3a.

Petitioner filed a claim for unemployment benefits on November 6, 1975, the same day he quit his job. An administrative hearing before a Referee was held on January 27, 1976; petitioner appeared and testified at the hearing. He was unrepresented by counsel. In his Findings and Conclusions, dated February 24, 1976, the Referee indicated:

> . . . the evidence reveals that approximate (sic.) two to three weeks prior to the claimant's date of leaving, the 'roll foundry' was closed permanently and claimant was transferred to the terret (sic.) line. Claimant, at this time, real (sic.) realized that all of the other functions at Blaw-Knox were engaged in producing arms for the Armament Industry. Claimant's religious beliefs specifically exempts claimant from producing or aiding in the manufacture of items used in the advancement of war.

Pet. App. p. 2a. The Referee concluded that the petitioner "quit due to his religious convictions," but that he had the burden of "going forward and establishing good cause in connection with the work, and that claimant has not done so in this case." Pet. App. p. 3a. The Referee noted that it was Thomas who had placed the special conditions upon his work and that another Jehovah's Witness continued to work for Blaw-Knox. Pet. App. 3a.

Thomas then filed a timely appeal to the Indiana Employment Security Division Review Board (hereinafter referred to as Board). In its decision of November 29, 1976, the Board adopted the Findings and Conclusions of the Referee. The Board also found that Thomas

> . . . left his employment voluntarily because his religious beliefs as a Jehovah's Witness would not allow him to continue to work producing arms, after being transferred from his original department which was not engaged in the manufacture of items used in the advancement of war.

Pet. App. p. 5a. The Board, however, affirmed the Referee's decision that Thomas left his employment without good cause in connection with the work and that the statutory penalty should be imposed. Pet. App. p. 5a. The statutory penalty includes ineligibility for benefits, and both a waiting period and an earning requirement before future eligibility for unemployment benefits can be established. Ind. Code 22-4-15-1 (Burns Code Ed., 1979 Supp.).

At this point, the Legal Aid Society of Gary, Inc., entered the case on Thomas' behalf and an appeal was filed before the Indiana Court of Appeals. Appellant Thomas alleged that the Board had erred in concluding that he quit his employment without good cause in connection with the work, that the denial of unemployment benefits in this case violated his First Amendment right to the free exercise of religion, and that there was no compelling state interest to justify such an infringement. In its October 26, 1978 decision, the Court of Appeals held:

> Under the authority of *Sherbert,* we are compelled to hold that the disqualifying provision of I.C. 22-4-15-1 (Burns Code Ed., 1979 Supp.), as it applies to Thomas, casts an impermissible burden on his First Amendment guarantee to the free exercise of his religion. Because the Board has conceded that no "compelling state interest" exists to justify such a burden, we must hold that the statute is unconstitutional as applied to Thomas.

> The judgment is reversed and the cause remanded with directions that the Board enter an award not inconsistent with this opinion.

Pet. App. 19a. One Justice of the Court of Appeals dissented from this decision.

The Indiana Court of Appeals decision came before the Supreme Court of Indiana on a Petition to Transfer filed by the Board. In a 3-2 decision, the court reversed the appellate court. Associate Justice Pivarnik delivered the opinion of the court, two justices concurring with him. Justice Pivarnik concluded that Thomas' reasons for quitting were personal, not clearly stated, not objectively related to the employment, and that Thomas was not required to violate a cardinal tenet of his religion; Thomas' right to the free exercise of religion had thus not been violated. The majority found *Sherbert* v. *Verner,* 374 U.S. 398 (1963) did not require Indiana to provide unemployment compensation benefits to Thomas. The court also held that to grant benefits to Thomas, while denying them to other employees who quit for personal or non-religious reasons, would violate the establishment clause of the First Amendment. Pet. App. pp. 26a-39a. Justices Hunter and DeBruler dissented and wrote opinions; both found this court's decision in *Sherbert* v. *Verner, supra,* to be controlling on the facts presented.

Petitioner, Eddie C. Thomas, then timely filed his Petition for Writ of Certiorari to the Supreme Court of Indiana. The petition was granted by this court on February 19, 1980.

SUMMARY OF ARGUMENT

The petitioner, a Jehovah's Witness, was hired to work in the roll foundry at Blaw-Knox. Approximately one year after his hiring, the foundry was permanently closed, and petitioner was transferred to another division of the plant, the turret line, which was directly involved in the manufacture of tanks. Unable to square his religious convictions with such direct involvement in the manufacture of armaments, petitioner searched for a way to reconcile his religious beliefs with his employment through transfer, lay-off, etc. No alternative proved possible, and petitioner voluntarily resigned his job.

He then sought unemployment compensation benefits which were denied by the Appeals Referee and the Indiana Employment Security Division Review Board. Although both found Thomas left his employment because his religious beliefs would not allow him to manufacture arms, both held the termination not to be "good cause in connection with the work" as required by Ind. Code 22-4-15-1. (Burns Code Ed. (1979 Supp.). Thomas appealed to the Indiana Court of Appeals which held *Sherbert* v. *Verner,* 374 U.S. 398 (1963) to be controlling. The Indiana Supreme Court reversed, found *Sherbert* not applicable, and upheld the Board's denial of benefits.

(a) The Indiana Supreme Court misinterpreted and misapplied *Sherbert* which directly controls the present case. The denial of unemployment compensation benefits derives solely from the belief and practices of Thomas' religion, and unconstitutionally forces him to choose between following the precepts of his religion and forfeiting benefits, or abandoning the precepts of his religion to remain employed. See *McDaniel* v. *Paty,* 435 U.S. 618 (1978). The actions of the state Board penalize Thomas

for the exercise of his religious beliefs and are a deterrent to the same. The inquiry by the Indiana Supreme Court into Thomas' religious beliefs was improper and contrary to law.

The fact that another Jehovah's Witness was able to accomodate his religious beliefs to such work is irrelevant to Thomas. The penalty for the exercise of his religious beliefs is direct and unmistakable, and the state has previously conceded that no compelling state interest is present in this case.

(b) The Indiana Supreme Court held that to grant unemployment compensation benefits to Thomas would amount to a forbidden "establishment of religion." There is no basis for such a conclusion. The grant of benefits here clearly has a secular purpose, its primary effect is not to advance religion, and does not entangle the state in any way with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971). Rather, the benefits simply prevent the imposition of a penalty for petitioner's exercise of his religious beliefs. *Sherbert* v. *Verner,* supra.

ARGUMENT

I.

THE DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO PETITIONER, A JEHOVAH'S WITNESS, WHO VOLUNTARILY TERMINAED HIS EMPLOYMENT IN THE ARMS PRODUCING SECTION OF A FACTORY, VIOLATES PETITIONER'S FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF RELIGION.

A.

Introduction

For decades, this court has zealously safeguarded the religious freedom of citizens against intrusion by governmental action. Whether the interference with that freedom was by means of a direct prohibition, see *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), or by forcing individuals to choose between governmental benefits and their religiously inspired beliefs, see *Sherbert* v. *Verner,* 374 U.S. 398 (1963), this court has consistently acted to protect the inviolability of religious conscience. The present case is another instance in which a religiously motivated individual seeks protection against governmental intrusion into the realm of religious belief.

The petitioner, Eddie C. Thomas, left his employment because his religious beliefs as a Jehovah's Witness would not allow him to work in a part of his employer's factory which produced arms. The Jehovah's Witnesses are no strangers to the federal judiciary; indeed, a good deal of First Amendment law has been constructed around their activities and beliefs. See, e.g., *Cantwell* v. *Connecticut,* supra; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Niemotko* v.

State of Maryland, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1963); *Lincoln* v. *True,* 408 F. Supp. 22 (W.D. Ky. 1975); *Redmond* v. *Gaf Corp.,* 574 F.2d 897 (7th Cir. 1978). Their characteristics are well known:

> The Witnesses are an ultra and uncompromising religious sect whose members profess allegiance to a visionary heavenly kingdom and disclaim all duties of citizenship which they deem in conflict with such heavenly allegiance. In the utmost good faith they unhesitatingly choose to suffer rather than to abate one jot or tittle their zealously held doctrine of primary responsibility to the super-mundane sovereignty which they consider themselves bound to serve.

United States ex. rel. Hoce v. *McGinnis,* 56 F.Supp. 668 (S.D. W.Va. 1944), at 668.

This court has traditionally carved a special and "preferred" position for First Amendment rights generally, and religious rights in particular. *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). The value placed upon religious freedom in our society requires that the courts, as the guardian of individual rights, zealously protect religious belief and exercise. As with other First Amendment rights, "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Inevitably, individual rights and societal and governmental needs interact. In such situation, reflecting basic First Amendment values, the standard formulation of the test to be applied where free exercise claims are raised is that if the challenged state action is to withstand constitutional challenge

> it must be either because her disqualification as a beneficiary represents no infringement by the state of her constitutional rights of free exercise, or be-

> cause an incidental burden on the free exercise of Appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate . . ."

Sherbert v. *Verner,* 374 U.S. 398, 403 (1963). *See also, generally Speiser* v. *Randall,* 357 U.S. 513 (1958). In its oral argument before the Indiana Court of Appeals, the respondent Board conceded that in the event an infringement of petitioner's freedom of religion was found, no compelling state interest could be offered in justification. Pet. App. p. 13a; 381 N.E.2d 888, 892, (1979).

The actions of the Indiana administrative officials, and the decision by the Indiana Supreme Court in this matter, fail to pass muster under uniformly accepted and consistently applied constitutional principles and cases. Those actions must be reversed by this court.

B.

Petitioner's Disqualification For Unemployment Compensation Benefits Is A Direct Burden On His Right To Free Exercise Of Religion And Is Directly Contrary To Sherbert v. Verner.

The Indiana Supreme Court decision is directly contrary to the decision in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) and thus must be reversed. The uncontroverted evidence shows that petitioner was involuntarily transferred from the roll foundry to an armament producing division of his employer's factory. Despite his best efforts to secure a transfer to a non armaments portion of his employer's business, or to secure a lay-off, petitioner was thus constrained to terminate his employment because of his religious beliefs as a Jehovah's Witness. The denial of unemployment benefits is consequently a direct penalty and burden for his exercise of religious beliefs. This is

a result that Indiana, under the First and Fourteenth Amendments, may not constitutionally achieve.

In *Sherbert, supra,* a Seventh Day Adventist was discharged by her employer for her refusal to work on Saturday, the Sabbath of her faith. Thereafter, she was unable to obtain other employment because of the requirement of Saturday work. Her claim for unemployment compensation benefits was denied by the state of South Carolina on the grounds that she had failed, without good cause, to accept suitable work when offered. The denial was upheld on judicial review and affirmed by the Supreme Court of South Carolina. Mrs. Sherbert appealed to the United States Supreme Court, contending that the disqualification abridged her First Amendment right to the free exercise of religion. This Court reversed and held:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand, Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Nor may the South Carolina's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

Sherbert v. *Verner,* 374 U.S. 398, 404. Because the State offered no persuasive "compelling interest" to justify this infringement, the Court held that for constitutional reasons the state was required to exempt her from its Saturday availability requirement.

Relying on this analysis, this Court recently held unconstitutional a Tennessee statutory provision disqualifying ministers as candidates for delegates to the State Constitutional Convention because it violated appellant's First and Fourteenth Amendment rights. *McDaniel* v. *Paty,* 435 U.S. 618 (1978). Chief Justice Burger delivered the opinion of the majority holding, at 626:

> Yet under the clergy disqualification provisions, McDaniel cannot exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." 5 The Writings of James Madison 288 (G. Hunt ed. 1904). In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion "[T]o condition the availability of benefits (including access to the ballot) upon this appellant's willingness to violate a cardinal principle of (his) religious faith (by surrendering his religiously impelled ministery) effectively penalizes the free exercise of (his) constitutional liberties." *Sherbert* v. *Verner,* 374 U.S. 398, 406, 83 S.Ct. 1790, 1795, 10 L.Ed. 2d 965 (1963).

As in *Sherbert, supra,* the Court found no compelling state interest to justify an infringement on McDaniel's First Amendment rights.

Thomas's situation is strikingly similar to Adelle Sherbert's as an analysis of the facts and circumstances in each case reveals. Adelle Sherbert was a member of the Seventh-Day Adventist Church and as such was obligated

not to work on Saturdays. Eddie C. Thomas is a Jehovah's Witness and his religious beliefs specifically forbid him from producing or aiding in the manufacture of items used in the advancement of war. When Adelle Sherbert began working with Spartan Mills, her last place of employment, and up to 1959, she was not required to work Saturdays and therefore, her job was not in conflict with her religious beliefs. Likewise, Thomas joined Blaw-Knox in 1974 and was hired to work in the Roll Foundry, a "department which was not engaged in the manufacture of items used in the advancement of war", Pet. App. p. 5a; there was at that time no conflict with his religious convictions.

Circumstances changed for both Sherbert and Thomas. Spartan Mills' work week was changed to six days, including Saturdays, and Adelle Sherbert was then required to work Saturdays in clear violation of her religious beliefs. In the instant case, petitioner Thomas was transferred from the Roll Foundry to the turret line, a division of the company directly engaged in the production of armaments, an activity strictly prohibited by his religion. When confronted with the dilemma of employment directly contrary to religious convictions, both Adelle Sherbert and Eddie C. Thomas chose the latter, and as a result, she was discharged and he had no alternative but to quit his job. In both instances the one and only reason for their unemployment was their religion and their ineligibility for benefits derived solely from practice of their religion.

In *Sherbert, supra,* the Court concluded that she was thus forced to make an impermissible choice between the precepts of her religion and unemployment. Petitioner, Eddie C. Thomas, was likewise faced with that exact un-

constitutional choice. As in *Sherbert,* the denial of benefits effectively penalizes Thomas' free exercise of religion guaranteed by the First Amendment and protected against state action by the Fourteenth Amendment. The fact that Sherbert "refused suitable work without good cause" and Thomas quit "without good cause in connection with the work" has no constitutional significance. These are but labels. The unmistakeable reality is that disqualification on either ground operates as a penalty for and deterrent to the exercise of First Amendment freedoms. *Sherbert, supra; Lincoln* v. *True,* 408 F.Supp. 22 (D.Ky. 1975); *Spence* v. *Bailey,* 465 F.2d 797 (6th Cir. 1972).

The Supreme Court of Indiana concluded that Eddie Thomas' First Amendment rights had not been abridged by the denial of unemployment benefits to him. According to the court, "it was unclear what Thomas' belief was and the basis for said belief." Pet. App. p. 37a; 391 N.E. 2d at 1133 (1979). The court also emphasized that Thomas was "not required by statute to violate a cardinal tenet of his religion." Pet. App. p. 38a; 391 N.E.2d at 1133 (1979). The court applied erroneous standards in determining whether petitioner's First Amendment rights had been violated and embarked on an impermissible and improper inquiry into the nature and basis of Thomas' religious beliefs.

Firstly, the findings and conclusions of the Appeals Referee (". . . claimant did quit due to his religious convictions," Pet. App. p. 3a) were adopted and affirmed by respondent Review Board ("he left his employment voluntarily because his religious beliefs as a Jehovah's Witness would not allow him to continue to work producing arms, after being transferred from his original

department which was not engaged in the manufacture of items used in the advancement of war." Pet. App. p. 5a). Under Indiana law, these determinations of fact are "conclusive and binding." Ind. Code 22-4-17-12 (Burns Code Ed. 1979 Supp.). The Indiana Supreme Court did not overrule these factual determinations and thus the issue of the application of the disqualifying provision of the Indiana law is directly raised. Even more important, under the First Amendment, governmental agents may make only limited inquiries into religious beliefs. "[I]t is no business of courts to say . . . what is a religious practice or activity. . ." *Fowler* v. *Rhode Island,* 345 U.S. 67, 70 (1953). *See* also *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1976). Courts have consistently refrained from involving themselves in the type of inquiry about which the *Fowler* court warned them and in which the Indiana Supreme Court embarked in this case.

> [I]n such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.

U.S. v. *Seeger* (1963) 380 U.S. 163, at 184. See also *Moskowitz* v. *Wilson,* 432 F.Supp. 947 (D.Conn. 1977); *Monroe* v. *Bombard,* 422 F.Supp. 211 (D.N.Y. 1976); *Geller* v. *Secretary of Defense,* 423 F.Supp. 16 (D.D.C. 1976); *Redmond* v. *Gaf Corp.,* 574 F.2d 897 (7th Cir. 1978); *Teterud* v. *Burns,* 522 F.2d 357 (8th Cir. 1975). In addition, it should be noted there has been no question raised as to the sincerity of Thomas' belief or bonafideness of the group to which he belongs.

There is, furthermore, no requirement that the religious practice be absolutely mandated in order to elevate peti-

tioner's claims to a level of constitutional significance. Again, it is not the province of the courts to dictate which practices or tenets are or are not required in a particular religion.

> The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

United States v. *Ballard,* 322 U.S. 78, 87 (1944); see also *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* supra. As this court has noted:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. *Barnette,* 319 U.S. 624, 642 (1943).

Petitioner has indeed shown a clear violation of his First Amendment right to the free exercise of religion. Therefore, the decision of the Supreme Court of Indiana must be reversed.

II.

GRANTING UNEMPLOYMENT COMPENSATION BENEFITS TO PETITIONER DOES NOT AMOUNT TO AN UNCONSTITUTIONAL "ESTABLISHMENT OF RELIGION."

The Indiana Supreme Court held that granting unemployment compensation benefits to petitioner would violate the establishment clause of the First Amendment. Pet. App. p. 39a, ... Ind. ....., 391 N.E.2d at 1134 (1979). This ruling is directly contrary to decisions of this court and the values and purposes underlying the First Amendment.

This court has had numerous occasions to consider the underlying bases and the practical application of the religion clauses of the First Amendment, and has struggled to reconcile the often contradictory pulls of the two clauses. In *Walz* v. *Tax Commissioner of the City of New York,* 397 U.S. 664 (1970), Chief Justice Burger summarized the court's position with respect to the religion clauses as follows, at 669:

> The general principle deducible from the First Amendment and all that has been said by the court is this: That we will not tolerate either governmentally estabished religion or government interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

The present case is a dramatic example of such "benevolent neutrality" since no valid establishment clause concern is implicated by the provision of unemployment compensation benefits to petitioner.

This court has defined the major evils against which the Establishment Clause was intended to afford protection as "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Lemon* v. *Kurtzman* (1971) 403 U.S. 602 at 612. Each of these matters has likewise been subject to analysis and application, with the result that three general tests have evolved. First, is there a secular purpose? Second, is the principal or primary effect one that neither advances nor inhibits religion? Finally, is there excessive government entanglement with religion? *Lemon* v. *Kurtzman, supra* at 615. Indiana is here administering a general system of unemployment compensation, designed to protect its citizens against the "economic insecurity" of unemployment and to provide benefits "to persons unemployed through no fault of their own." Ind. Code 22-4-1-1 (Burns Code Ed, 1979 Supp.). As the Indiana Court of Appeals noted, Thomas' only "fault" in this matter was belief in the basic tenets of the Jehovah's Witnesses religion. Pet. App. p. 14a, 381 N.E.2d 888 (1978). The granting of unemployment compensation benefits here simply removes the economic sanction which has otherwise been imposed upon petitioner for exercise of his First Amendment rights. It reflects "nothing more than the governmental obligation of neutrality in the face of religious differences, and does not present that involvement of religious with secular institutions which it is the object of the establishment clause to forestall." *Sherbert* v. *Vener,* 374 U.S. 398, 410 (1963).

Concededly, Thomas' unemployment was a direct result of his religious views. Granting unemployment benefits in such a situation, however, does not threaten the separation of church and state, or "establish religion."

Rather, such action is a recognition that there are two clauses which concern religion in the First Amendment and some reconciliation of them is required. To deny unemployment benefits, in such a situation, unnecessarily penalizes petitioner's exercise of his religious rights and presents "a manifestation of . . . hostility (toward religion) at war with our national tradition that is embodied in the First Amendment guarantee of free exercise of religion." *McCollum* v. *Board of Education,* 333 U.S. 203, 211-212 (1948). The Indiana Supreme Court decision failed to "reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and teach religious ideas and practices is protected by the free exercise clause." *McDaniel* v. *Paty,* 435 U.S. 618 (1978), at 638. (Brennan, J., concurring). See *Everson* v. *Board of Education,* 330 U.S. 1 (1947); Gianella, *Religious Liberty, Non-Establishment, and Doctrinal Development,* Part II, 81 HARV. L. REV. 513 (1967). As the Court noted in exempting Amish children from a mandatory school attendance statute:

> (a) regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. . . . The court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by this right of free exercise.

Wisconsin v. *Yoder,* 406 U.S. 205 (1972) at 220, 221.

CONCLUSION

For the above reasons petitioner respectfully submits that the decision of the Indiana Supreme Court is contrary to the First Amendment and precedents of this Court and must be reversed.

Respectfully submitted,

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